SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 503

CECIL REGINALD JAY,

Petitioner

vs.

JOHN P. BOYD, District Director,
Immigration and Naturalization Service

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF PETITIONER

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Opinions Below

There was no written opinion in the District Court. The original *per curiam* opinion of the Court of Appeals (R. 25-26) is reported at 222 F. 2d 820. The *per curiam* opinion on petition for rehearing (R. 27-28) is reported at 224 F. 2d 957.

Jurisdiction

The judgment of the Court of Appeals was entered on May 10, 1955 (R. 26), and the petition for rehearing was denied on August 4, 1955 (R. 27-28). The petition for writ of certiorari was filed on November 2, 1955. Certiorari

was granted January 9, 1956 (R. 28). The jurisdiction of this court is invoked under 28 U.S.C. 1254 (1).

Questions Presented

(Petitioner adopts the following questions set forth in the brief of the American Jewish Congress as *Amicus Curiae*, at p. 4.)

1. Whether the Attorney General, having by regulation established hearing procedures authorizing a special inquiry officer of the Service to determine whether a deportable alien should receive the discretionary relief of suspension of deportation, may vitiate such hearing by allowing such officer to deny such relief to an alien, otherwise qualified for it, solely and exclusively on the basis of "confidential information," not of record, the source, nature and details of which are not disclosed to the alien.

2. Whether a decision of a special inquiry officer denying an application for suspension of deportation should be set aside and a new determination required where the decision, in violation of a regulation promulgated by the Attorney General having the force of law, does not contain a statement of "the reasons for granting or denying such application."

Statute and Regulation Involved

Sections 244 (a) (5) and 244 (c) of the Immigration and Nationality Act of 1952, 66 Stat. 163, 214-216; 8 U.S.C. 1254 (a) (5) and 1254 (c), provide:

> Sec. 244 (a). As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who—
>
> . . . . . .

(5) is deportable under paragraph (4), (5), (6), (7), (11), (12), (14), (15), (16), (17) or (18) of section 241 (a) for an act committed or status acquired subsequent to such entry into the United States, or having last entered the United States within two years prior to, or at any time after the date of enactment of this Act, is deportable under paragraph (2) of section 241 (a) as a person who has remained longer in the United States than the period for which he was admitted; has been physically present in the United States for a continuous period of not less than ten years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation, and proves that during all of such period he has been and is a person of good moral character; has not been served with a final order of deportation issued pursuant to this Act in deportation proceedings up to the time of applying to the Attorney General for suspension of deportation; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen or an alien lawfully admitted for permanent residence.

* * * * * * *

(c) Upon application by any alien who is found by the Attorney General to meet the requirements of paragraph (4) or (5) of subsection (2) of this section, the Attorney General may in his discretion suspend deportation of such alien. If the deportation of any alien is suspended under the provisions of this subsection, a complete and detailed statement of the facts and pertinent provisions of law in the case shall be

reported to the Congress with the reasons for such suspension. Such reports shall be submitted on the first and fifteenth day of each calendar month in which Congress is in session. If during the session of the Congress at which a case is reported, or, prior to the close of the session of the Congress next following the session at which a case is reported, the Congress passes a concurrent resolution stating in substance that it favors the suspension of such deportation, the Attorney General shall cancel deportation proceedings. If within the time above specified the Congress does not pass such a concurrent resolution, or if either the Senate or House of Representatives passes a resolution stating in substance that it does not favor the suspension of the deportation of such alien, the Attorney General shall thereupon deport such alien in the manner provided by law.

8 C. F. R. 244.3, promulgated December 17, 1952, 17 F. R. 11517, provides:

Sec. 244.3 *Use of confidential information.* In the case of an alien qualified for voluntary departure or suspension of deportation under section 242 or 244 of the Immigration and Nationality Act the determination as to whether the application for voluntary departure or suspension of deportation shall be *granted* or *denied* (whether such determination is made initially or on appeal) may be predicated upon confidential information without the disclosure thereof to the applicant, if in the opinion of the officer or the Board making the determination the disclosure of such information would be prejudicial to the public interest, safety, or security.[1]

[1] The regulations providing for the hearings on suspension of deportation, 8 C.F.R. 244.2, 242.54 (d) and 242.61 (a) are set forth in the appendix to this brief.

Statement of the Case

Petitioner is a sixty-five-year-old native of England who first came to the United States from Canada in 1914. In 1915 he enlisted in the Canadian Army, with which he served in France and Belgium during the First World War (R. 33). He reentered the United States in October, 1921, and since then has resided continuously in this country (R. 34) without having become a citizen (R. 16). In 1952, following an administrative hearing, he was ordered deported on the ground of his membership in the Communist Party between 1935 and 1940 (R. 47).

Thereafter he applied for suspension of deportation under provisions of the Immigration and Nationality Act of 1952, which for the first time authorized suspension in cases such as his.

Pursuant to the regulations established by the Attorney General (R. 13), a hearing was held before a special inquiry officer, at which petitioner presented evidence of his eligibility for the relief afforded by the statute and his general circumstances, which would bear upon the question of whether a suspension of deportation should be granted (R. 25-46). Petitioner testified in his own behalf and offered statements as to his good moral character and attachment to the principles of the Constitution and his dissociation from any subversive activities from a Seattle businessman (R. 43-44), a Seattle attorney (R. 44-45), and from the Assistant Executive Director of the Seattle Housing Authority where he had been employed from 1944 to 1950 (R. 45-46). No documentary information concerning petitioner was offered by the government at the hearing. Petitioner was advised by the special inquiry officer that if anything derogatory was contained in the report of an independent investigation conducted by the Service relative to the petitioner's character for the past ten years, peti-

tioner would be given an opportunity to examine it and to refute it for the record if he so desired (R. 41-42). Petitioner established at the hearing that he was qualified for suspension of deportation (R. 48). However, the special inquiry officer who conducted the hearing "after considering confidential information" which was not disclosed to petitioner, concluded that suspension of deportation should be denied (R. 48).

Petitioner appealed from this decision to the Board of Immigration Appeals upon the ground that denial of discretionary relief should be based solely upon matters of record (R. 51). Petitioner's appeal to the Board was dismissed (R. 51). He was taken into custody for deportation and on May 3, 1954, applied to the District Court for writ of *habeas corpus*, setting forth the matters which have just been outlined (R. 3-9). His application for *habeas corpus* was dismissed by the District Court and he appealed to the United States Court of Appeals in the Ninth Circuit, which affirmed the District Court, upholding the use of undisclosed confidential information not made a part of the record (R. 26, 28). This court granted certiorari (R. 28).

Summary of the Argument

I. A regulation which permits subordinate officers of the Immigration and Naturalization Service to decide applications for suspension of deportation on the basis of information received off the record is invalid. It would appear to conflict with explicit provisions of subsection (a) of Section 244 of the Immigration and Nationality Act of 1952 which affords an applicant the opportunity to prove his eligibility for suspension of deportation and the circumstances which may move an adjudicating officer to grant him the relief sought. It would also appear to conflict with provisions of subsections (b) and (c) of Section 244, requir-

ing that Congress, as the final arbiter in deportation cases, be furnished a complete and detailed statement of the facts and reasons in each case where suspension is to be recommended. Administration of each of these subsections would appear to require an administrative hearing.

A hearing, if required, must be a fair one. The determination of an application for suspension of deportation on the basis of "confidential information" received off the record violates the concept of fairness and vitiates the hearing procedure which the regulation purports to require. This is especially so since suspension of deportation is the only relief available to thousand of lawfully admitted, and to many long resident aliens otherwise mandatorily subjected to what may amount to lifelong banishment or exile. Such a power should never be implied in the absence of express language, for when Congress intended to authorize the use of non-record and confidential information (as in the case of exclusion procedures) it expressed such intent in explicit and appropriate words.

II. Petitioner adopts by reference the summary of argument and argument set forth in the brief of the American Jewish Congress as *Amicus Curiae*, Points II and III, pages 5-6, 21-29:

I

A Regulation by the Attorney General Which Authorizes the Decision on an Application for Suspension of Deportation to be Predicated Upon Confidential Information Received Off the Record and Not Disclosed to the Applicant Is Invalid.

A. *The challenged regulation is inconsistent with the statute authorizing suspension of deportation.*

Both the text and the history of Section 244 of the Immigration and Nationality Act of 1952, 8 U.S.C.A. 1254 (66 Stat. 214), would appear to indicate that a hearing

is required for administration of the section in accordance with Congressional intent.

While the section does not explicitly direct that the Attorney General or a subordinate administrative officer to whom he may delegate his power shall conduct hearing, it does require that an alien applying for suspension of deportation is required to *prove* the necessary qualifying elements and the circumstances of hardship affecting him which will establish his eligibility, and may move the adjudicating officer to favorable action in his behalf.

The pertinent language of subsection (2) paragraph (5) of Section 244 reads as follows:

> "The Attorney General may, in his discretion, suspend deportation . . . in the case of an alien who . . . is deportable [as having been, after entry, a member of one of the subversive classes described in Section 241 (a) (6) (8 U.S.C.A. 1251 (6)](a) . . . has been physically present in the United States for a continuous period of not less than ten years immediately following the commission of an act or the assumption of a status constituting a ground for deportation, and proves that during all such period he has been and is a person of good moral character; has not been served with a final order of deportation issued pursuant to this chapter . . .; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien . . ." (8 U.S.C.A. Section 1254 (a) (5); words in brackets added)

Similar language, requiring proof by the alien of the factors qualifying him for suspension, is used in each of the first four paragraphs of the subsection, as well as in the fifth.

Since the alien must prove the factors necessary to qualify him for the relief sought, it would seem to be necessarily implied that some type of appropriate proceeding equivalent to a hearing must be provided by the Attorney General for this purpose.

The right to a fair hearing in conformity with prevailing regulations is, of course, firmly established. *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260. The provision for a hearing, however, is more than a mere act of grace since it would appear to be a necessary part of the execution of the expressed intent of Congress which requires that an opportunity be afforded the alien applicant to *prove* his good moral character, and the circumstances of exceptional and extremely unusual hardship affecting his case. The opportunity for proof implies not only the opportunity to present favorable facts and circumstances but likewise to rebut the unfavorable.[2]

The necessity of a hearing is also implicit in subsections (b) and (c) and section 244, each of which require "a complete and detailed statement of the facts and pertinent provisions of law in the case . . . [to] be reported to the Congress with the reasons for such suspension." Such a report is required in order to enable the Congress to

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[2] The language just referred to had its origin in the Smith Act of June 28, 1940, Section 20; 8 U.S.C. 155 (c) (1946 ed.); 54 Stat. 671, 673, which states in part that "in the case of any alien . . . who is deportable and who has proved good moral character for the preceding five years, the Attorney General may . . . (2) suspend deportation of such alien . . . if he finds that such deportation would result in serious economic detriment to a citizen or legally resident alien who was the spouse, parent, or minor child of such deportable alien. . . ."

Regulations for the administration of this provision were first published in 1941 (6 F.R. 68, 70) and provided that in the course of the hearing where "the alien has applied or given notice of intention of applying for the privilege of . . . suspension of deportation . . . the presiding inspector shall inquire thoroughly into all questions relating to the alien's eligibility to the relief requested in so far as such inquiry is necessary to supplement the general information form."

perform the function which it reserved to itself under the two subsections, namely, to act as the final arbiter on whether deportation shall be suspended. Subsection (b) provides that if neither the Senate nor the House passes a resolution stating in substance that it does not favor the suspension of deportation, in the case of suspension proceedings under subparagraphs (1), (2), or (3), or subsection (a), deportation proceedings are to be cancelled. Subsection (c) provides that if the Senate and House of Representatives do not pass a concurrent resolution stating in substance that the Congress favors the suspension of deportation, or if either House does pass a resolution stating that it does not favor suspension of deportation, the Attorney General shall proceed to deport the alien as provided by law.

This section also has its origin in the Act of June 28, 1940.[3] Paragraphs (4) and (5) of subsection (a), section 244 of the Immigration and Nationality Act of 1952, extended the privilege of suspension of deportation to new classes of deportable aliens so that suspension is now available as relief in almost every deportation case.

House Report No. 1365, February 14, 1952, 82nd Congress, Second Session, to accompany H.R. 5678, discusses the sections just referred to in the following language:

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[3] "* * * If the deportation of any alien is suspended under the provisions of this subsection for more than six months, all of the facts and pertinent provisions of law in the case shall be reported to the Congress within ten days after the beginning of its next regular session, with the reasons for such suspension. The clerk of the House shall have such report printed as a public document. If during that session the two Houses pass a concurrent resolution stating in substance that the Congress does not favor the suspension of such deportation, the Attorney General shall thereupon deport such alien in the manner provided by law. If during that session the two Houses do not pass such a resolution, the Attorney General shall cancel deportation proceedings upon the termination of such session . . . 8 U.S.C. (1946 ed.) Section 155 (c); 54 Stat. 673.

> "The Attorney General is required to report each case in which he suspends deportation under the [first] . . . three categories to the Congress and the adjustment of status would become final in the absence of adverse action either by the Senate or House of Representatives." * * * "The Attorney General is required to report each case in which he suspends deportation under the latter categories (4) and (5) to the Congress and the adjustment of status does not become effective unless Congress affirmatively approves the adjustment by a concurrent resolution, nor shall such an adjustment be effective if either the Senate or House of Representatives passes a resolution disapproving suspension." House Misc. Rep., Vol. I, Series 11575, 82nd Cong., 2nd Sess., page 62.

Paragraphs (1), (2) and (3) of subsection (a), Section 244 of the Act, are substantially similar in their operation to 8 U.S.C. (1946 ed.) Section 155(c). The requirement of affirmative action on the part of Congress in certain classes of cases constitutes a departure, though not a substantial one, from the procedure under the former section. Under both procedures Congress reserved to itself the right to act as the final arbiter in every suspension of deportation case.

Far from entrusting suspension of deportation solely to the discretion of the Attorney General, giving him a "dispensation akin to the power of executive clemency" as urged by the government,[4] Congress intended to and did carefully and explicitly divide the exercise of this function between the executive and the legislative branch of the government. To the Attorney General was delegated the investigative function, the preparation of the

[4] Brief for the respondent in opposition to petition for certiorari, page 9.

record for Congressional use, and the screening out of applicants obviously beyond the scope of the relief which Congress provided by this measure.

The statutory requirement of a "complete and detailed statement of facts" and the "reasons for" suspension action clearly implies that the Congress intended that the Immigration and Naturalization Service supply it with all pertinent information from the record whether favorable or unfavorable to the applicant in every case in which suspension was granted by the service. Congress could scarcely have used such sweeping language if it had intended to authorize decisions, favorable or unfavorable, to be made upon secret, "confidential information" not a part of the record. Yet, this is exactly what the regulation purports to authorize, for

> ". . . The determination as to whether the application for . . . suspension of deportation should be *granted* or denied . . . may be predicated upon confidential information . . ." (8 C.F.R. sec. 244.3) (emphasis added).

Thus the decision of the special inquiry officer or of the Board of Immigration Appeals on which Congress has reserved the final judgment may be predicated upon matters not made a part of the record in the case.

It is inconceivable that Congress could have intended that a record upon which its final determinative action would be based, or any summary of that record, should not contain the very matters upon which the special inquiry officer predicated his decision.[3]

[3] Congress might very well take a different view of a suspension case than was taken by the special inquiry officer, or the Board of Immigration Appeals. See, for example, H.R. Rep. No. 1458, 84th Congress, 1st Session, page 6, referring to the *Brancato* case, discussed on pages 11-13, brief of American Jewish Congress as amicus curiae.

The position here advanced, that the Congress had no intention of authorizing administrative decisions in suspension of deportation cases on the basis of undisclosed confidential information, finds further support in the fact that the twelve-year administrative history of suspension proceedings was before Congress during the debates on the Immigration and Nationality Act of 1952. No regulation authorizing the use of off-the-record information had ever been promulgated by the Attorney General prior to the passage of the 1952 Act.[6]

There was a considerable body of judicial precedent relating to the exercise of discretionary relief of suspension of deportation. It was well established that while the Attorney General's "exercise of discretion" was not reviewable as such, the courts would require the Attorney General to exercise discretion where he wrongfully or mistakenly refused to do so, *Mastrapasqua* v. *Shaughnessy*, (C.A. 2, 1950) 180 F. 2d 999; see *United States ex rel Weddeke* v. *Watkins*, (C.A. 2, 1948) 166 F. 2d 369, 372; *United States ex rel. Adel* v. *Shaughnessy*, 183 F. 2d 371, 372. It had been held that the decision of the suspension of deportation cases on non-record or confidential information was such a clear abuse of discretion: *Alexiou* v. *McGrath*, (D. C. 1951) 101 F. Supp. 421.[7] Congress, presumably aware of this admin-

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[6] The 1941 regulation issued within six months after the passage of Section 20 of the Smith Act, see footnote 1, page 10, *supra*, remained in effect substantially unchanged until the adoption of the regulation here challenged which for the first time purported to authorize the use of off-the-record information.

[7] This case was decided prior to the enactment of the 1952 legislation. It has been followed, or a similar result has been reached, in a number of district court cases: *Maeztu* v. *Brownell*, (D.C. 1955) 132 F. Supp. 751; *Orahorats* v. *Brownell* (D.C. 1955) 134 F. Supp. 84; *Ex parte Mota Singh Chohan*, (N.D. Cal. 1954) 122 F. Supp. 851. All are to the effect that it is improper for a hearing officer or Board of Immigration Appeals to base his decision on an application for suspension of deportation solely on off-the-record or confidential information. All except the *Alexiou* case were decided after the passage of the 1952 Act and so, of course,

istrative history and judicial interpretation, chose to enact section 244 in language far more consistent with an intent to require that the decision of a suspension application be predicated solely on a "complete and detailed" record, than to authorize the use of off-the-record "confidential information".

This cannot be attributed to Congressional inability to express its intent, for "when Congress has the will it has no difficulty in expressing it". *Bell* v. *United States*, 349 U.S. 81, 83. For example, in section 235(c) of the 1952 Act, 8 U.S.C.A. sec. 1225(c), the Attorney General is specifically authorized to make a determination that an "alien is excludable . . . on the basis of information of a confidential nature". This may be done when "the Attorney General, in the exercise of his discretion, and after consultation with appropriate security agencies of the Government, concludes" that the disclosure of the information "would be prejudicial to the public interest, safety, or security." This explicit statutory authority is granted only in exclusion proceedings where the immigrant, seeking entry for the first time has no rights whatsoever, except such as Congress may see fit to grant him. *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537. The explicit statutory power delegated to the Attorney General in section 235(c)

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could not have been considered by Congress. *Arakas* v. *Zimmerman*, 200 F. 2d 322, 324, was decided in 1952 after the passage of the 1952 act so that it could have had no direct bearing on the Congressional action. The court for the Third Circuit stated: "We agree entirely with the holding in *Alexiou* v. *McGrath* . . . ." and commented that the refusal to suspend deportation "on the basis of confidential information not part of the hearing record" was "serious error" on the part of the District Court. In *United States ex rel. Accardi* v. *Shaughnessy*, (C.A. 2, 1953) 206 F. 2d 897, the court referred with apparent approval to the *Alexiou* case and distinguished it on the ground that there "it affirmatively appeared that evidence not of record was considered" whereas in the case before the court "[t]he Board's opinion discussed only the evidence in the record, and such evidence was amply sufficient to support discretionary denial of suspension of deportation," (at p. 900).

of the Act was historically derived from the war time and national emergency powers granted in 22 U.S.C.A. 223, 55 Stat. 252, and from regulations expressly promulgated under this statutory authority. 8 C.F.R. 175.57(b), 10 F.R. 8995. In the *Knauff* case this court specifically held that the proclaimed national emergency under which the regulation was promulgated was still in existence. It was against this background that Congress enacted section 235(c) of the Act, with its limited application and somewhat restrictive language.

By contrast the power arrogated in the challenged regulation is broader in scope than the statutory power just discussed; it is delegated to a host of relatively minor departmental officers[8] rather than to a cabinet officer, and it is applied to persons who, as lawfully admitted resident aliens, are fully entitled to Constitutional protection of their substantive rights, *Bridges* v. *Wixon*, 326 U.S. 135, 161, and to procedural due process in the disposition of any discretionary relief which may be accorded them by Congress. *United States ex rel Accardi* v. *Shaughnessy*, 347 U.S. 260, 268. The claimed right of a special inquiry officer to decide an application for suspension of deportation solely on the basis of information received off the record renders any administrative hearing on the application purely illusory. Since the regulation nullifies any right of the alien applicant to a hearing, it conflicts with the intent of Congress and should be held to be invalid.

B. *The Attorney General does not have the implied power to authorize the determination of an application for suspension of deportation upon undisclosed "confidential information" not placed upon the record.*

Assuming that section 244 of the Act is not construed as explicitly requiring that a decision be based upon the record

[8] See Brief of Amicus Curiae, pp. 7-11.

in the case, can the regulation be justified as the exercise of an implied power?

It is settled that where "the fundamental rights of men are involved" the acts of Congress relating to aliens must be "administered, not arbitrarily and secretly, but fairly and openly, under the restraints of the tradition and principles of free government", and that a decision based upon information imparted to an adjudicating officer in secret is void. *Kwock Jan Fat* v. *White*, 253 U.S. 454, 464. While the decision in this case involves the exercise of discretionary power, as distinguished from the substantive determination of whether the alien falls within a deportable class in the first instance, the fair exercise of discretion is scarcely less important to the legislative scheme than the original determination of deportability.

In terms of the number of persons affected, its importance cannot be overemphasized. Deportability is contested in only about one fifth of deportation hearings.[9] In the remainder of cases suspension of deportation or voluntary departure, discretionary measures, are the only forms of relief available.[10]

The deportation laws are framed in terms of a mandate to the Attorney General that any alien in the United States who falls within any of the very numerous classes proscribed by Congress[11] "shall be deported." 8 U.S.C.A. 1251. Especially in cases involving charges of proscribed

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[9] Task Force on Legal Services and Procedure, Report on Legal Services and Procedure, 272 (1955); cited by Maslow, Recasting our Deportation Law: Proposals for Reform, 56 Col. L. Rev. 309, 351.

[10] Petitioner in this case did not dispute the factual basis for the determination of deportability. It would appear from the record that he is being deported solely on his own statement that he was a member of the Communist Party between 1935 and 1940 (R. 47).

[11] It has been estimated that 700 different grounds of deportation may exist. Hearings Before the Senate Appropriations Committee on Department of Justice Appropriation for 1954, 83rd Cong. 1st Sess. 250 (1953), cited by Maslow, op. cit., 56 Col. L. Rev. 314.

political activity, persons may be deportable who, like the petitioner, have resided in this country longer than a majority of the native born.[12] The law may command the expulsion of an alien who was entirely ignorant of the fact that an organization to which she belonged in the remote past was committed to unlawful objectives, a manifestly harsh result where the membership was not proscribed when it occurred, and the deportable class has been defined retroactively. *Galvan v. Press*, 347 U.S. 521. Persons like petitioner who have long since abandoned the status which brought them within a deportable class and whose conduct has been unexceptionable for more than a decade would seem to fall within the orbit of Congressional intent as expressed in Section 244 and to be precisely those persons for whom the statute was designed.

The fact that the relief provided by the statute is discretionary does not mean that it can be exercised without a hearing. Although a matter may be explicitly committed to the Attorney General by statute and no express provision made for a hearing, the Attorney General will be required to justify a discretionary denial of bail pending deportation by showing on the basis of evidence adduced at a hearing for that purpose that his discretion was exercised in a manner consistent with legislative intent. *Carlson v. Lan-*

[12] Petitioner has continuously resided in the United States for 35 years. It has been 42 years since he first entered. Petitioner's case in this respect is typical of those who have been similarly charged. It has been estimated that in 1952 when Sec. 244 of the Act first made the relief here under consideration available to persons who had in the past been in a "subversive class", 63% of those so charged had resided in the United States 31 years or more. *Political Deportations in the United States*, 14 Lawyers Guild Rev., 93, 101. The computation, based in part upon material supplied at the request of Mr. Justice Frankfurter by the Immigration and Naturalization Service in connection with the consideration of *Carlson v. Landon*, 342 U.S. 524, referred to at p. 538, n. 34, shows the following as to the length of residence in the United States of 219 in political cases: Over 41 years in the United States, 18%; over 31 years, 63%; over 21 years, 96%; over 10 years, 98%. (Figures are cumulative.)

dan, 342 U.S. 534, 543. If the right to a hearing will be implied to determine whether the Attorney General's discretion has been exercised in accordance with the legislative scheme in such cases, it should likewise be implied where discretion with respect to deportation itself is involved.

In any event the Attorney General has provided for a hearing in Regulation 244.2. Having so provided, the hearing must be a fair one, for "it is now accepted that procedural due process must be observed in a hearing even though the alien is invoking relief which is, in any event, afforded only in official discretion." *United States ex rel. Giacalone* v. *Miller* (S.D.N.Y., 1949) 86 F. Supp. 655, 656-7.

Discretion exercised in secret is tantamount to a refusal to exercise discretion, or to an abuse of discretion, for, if a decision is made on the basis of matters not appearing of record, there is no way in which any court can determine whether discretion was exercised arbitrarily and capriciously or in a manner not consonant with the legislative intent. Irreparable damage is done, and the seeds of tyranny have been sown. See *Boudin* v. *Dulles* (DC, 1955) 136 F. Supp. 218.[13]

[13] cf. *Parker* v. *Lester* (C.A. 9, 1955), 227 F. 2d 708, where a panel of the Court of Appeals for the Ninth Circuit reversed a district court decision, 112 F. Supp. 433, and directed that officers of the United States Coast Guard be restrained from enforcing screening regulations against the plaintiff seamen. The regulations authorized an ex parte determination by the Commandant of the Coast Guard that certain seamen be excluded from access to the ships where they were employed, as a safety measure to protect waterfront facilities in times of national emergency. A "hearing" was granted to the seamen at which they purportedly had the opportunity to establish that the edict of the Commandant should not be applied to them. The regulations which were enjoined authorized hearing officers to predicate their decisions affecting the rights of the seamen to follow their employment upon confidential reports prepared by government security and investigative agencies, the contents of which were not disclosed to the seamen. Neither a confrontation of adverse witnesses nor a summary of the evidence, as in selective service

Regulation 244.3, which in effect permits decisions to be made without a hearing, is at variance with the intent of Congress as expressed in section 244 of the Immigration and Nationality Act of 1952. It is an attempted exercise of power which can not be implied from the statute, and which is inconsistent with the tradition and principles of a free government. The regulation is therefore void and proceedings taken under it are invalid. Petitioner's application for suspension of deportation should be remanded for determination on the evidence in the record.

Conclusion

On the basis of the foregoing, and argument set forth in points II and III of the Brief of the American Jewish Congress as *Amicus Curiae*, pages 21-29, it is respectfully submitted that the denial of petitioner's application for suspension of deportation should be set aside.

Respectfully submitted,

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Attorneys for Petitioner.

April 18, 1956.

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cases, cf. *United States* v. *Nugent*, 346 U.S. 1; was provided for. The Court quoted at length from the dissenting opinion of Mr. Justice Jackson in *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 225-227. The government obtained an extension of time within which to petition this Court for certiorari. According to the New York Times, March 25, 1956, page 1, it was decided not to file the petition for certiorari because it was believed that the action of the lower court would be sustained.

APPENDIX

Title 8, Code of Federal Regulations

Sec. 244.2 Suspension of Deportation.

An application for suspension of deportation shall be submitted in accordance with, and subject to, the provisions of Sec. 242.54 (d) of this chapter and shall be determined and disposed of in accordance with the provisions of this part and Sec. 242.61 of this chapter.

Sec. 242.54 (d) Application for discretionary relief:

Except in the case of an alien who is *prima facie* deportable under section 242 (f) of the Immigration and Nationality Act, 8 U. S. C. A. Sec. 1252 (f), at any time during the hearing the respondent may apply for suspension of deportation on Form I-256A or for voluntary departure, under section 244 of the said Act (8 U. S. C. A. Sec. 1254). The burden of establishing that he meets the statutory requirements for discretionary relief shall be upon the respondent. He may submit any evidence in support of his application which he believes should be considered by the special inquiry officer.

Sec. 242.61 Decision of special inquiry officer—(a) Preparation of Written Decision.

Except as provided in paragraph (b) of this section and Sec. 242.76, the special inquiry officer shall, as soon as practicable after the conclusion of the hearing, prepare a written decision signed by him which shall set forth a summary of the evidence adduced and his findings of fact and conclusions of law as to deportability, unless such findings and conclusions are waived by the respondent orally during

the hearing or by written waiver filed with the special inquiry officer after the conclusion of the hearing. If the respondent has applied for discretionary relief in accordance with the provisions of Sec. 242.54 (d), the decision shall also contain a discussion of the evidence relating to the alien's eligibility for such relief and the reasons for granting or denying such application. The decision shall be concluded with the order of the special inquiry officer as provided in paragraph (c) of this section.

(8691-8)